United Malayan Banking Corporation Bhd v Aluminex (M) Sdn Bhd & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–169–91
MOHD AZMI, PEH SWEE CHIN AND EDGAR JOSEPH JR SCJJ
15 MAY 1993

Securities *— Debentures — Priority — Debentures issued by company in favour of bank creating fixed and floating charges over existing and future assets of company — Company subsequently assigns rights and benefits to another bank under a contract — Whether interest of second bank subject to interest of first bank*

Banking *— Security for advances — Charge — Restriction on chargor's power to create later prior-ranking charges — Knowledge of subsequent chargee of existence of prior registered charge — Whether amounted to notice of terms of restrictive clause — Whether retention of title clause necessary to protect interest of subsequent chargee*

Banking *— Security for advances — Debenture — Chargee allowed to enter into transactions in ordinary course of business — Whether chargee acted outside its powers by issuing assignment before crystallization of debenture*

Banking *— Security for advances — Charge — Chargor's equity of redemption — Position of chargor's assignee*

Banking *— Security for advances — Assignment — Whether assignment amounted to fixed charge over book debts of chargor*

Words and Phrases *— 'Ordinary course of business'*

The first respondent, Aluminex (M) Sdn Bhd ('Aluminex'), had issued two debentures ('the debentures') in favour of the second respondent, United Asian Bank Bhd ('UAB'), in consideration of overdraft facilities granted to Aluminex by UAB. The debentures were lodged and registered at the Registry of Companies, and provided, inter alia, that Aluminex was not to be at liberty to create, save with the written consent of UAB, any other mortgage, debenture (whether fixed or floating), charge, pledge or lien ranking in priority to or pari passu with the debentures.

Aluminex was later appointed the sub-contractor under a building contract ('the sub-contract') and was to design, supply and install a glass curtain walling and frameless glazed screen. Subsequently, Aluminex executed an assignment ('the assignment') in favour of United Malayan Banking Corporation Bhd ('UMBC'), to secure the payment of moneys advanced ('the advance') to Aluminex's supplier, Ming Sing Glass Sdn Bhd ('Ming Sing'), for the purchase of glass which was to be used by Aluminex in the sub-contract. The assignment provided, inter alia, that Aluminex absolutely assigned to UMBC the sub-contract and all moneys due and payable to Aluminex under the sub-contract and all benefits, rights and advantages contained therein. The assignment was registered as a charge by Aluminex at the Registry

of Companies.

In the events which transpired, the amounts owing by Aluminex to UAB caused UAB to appoint receivers and managers under the debentures, thereby causing them to crystallize. The attention of the receivers and managers was then drawn to the fact that, pursuant to the assignment, a sum of RM285,811.88 payable to Aluminex as progress payments under the sub-contract, had been paid to UMBC, who had paid the same into a special account. At this point, a dispute arose between UAB and UMBC relating to the respective priorities of the charges created by the debentures in favour of UAB and the charge created by the assignment in favour of UMBC.

The judge, at first instance, determined the priority dispute in favour of UAB. [See [1992] 1 MLJ 435.] UMBC has appealed. The submissions of counsel for UMBC were twofold, that: (i) UMBC was entitled to priority since the glass was, at all material times, subject to an equitable charge in its favour; and (ii) alternatively, the assignment amounted to a subsequent fixed charge in respect of the book debts of Aluminex, which took priority over the debentures of UAB, since the debentures had not crystallized at the date of the assignment and UMBC did not have express notice of the restrictions in the debentures.

Held, allowing the appeal:

(1) The advance made by UMBC to Ming Sing was used to acquire the glass from Korean suppliers and was also the means whereby Aluminex obtained delivery of the glass for purposes of fulfilling its obligations under the sub-contract and, without which, Aluminex could not have done so. Clearly, therefore, the advance by UMBC was a purchase money advance and the assignment had created a security for the purchase of the glass.

(2) The determination of the priority issue, involving the prior chargee invoking an after-acquired property clause and the holder of the purchase money security interest, depended upon the sequence of the financing operations. Although UAB's debentures were prior in time and contained restrictions on Aluminex's power to create later prior-ranking charges, save with the written consent of UAB, that did not confer upon UAB and their receivers, a charge over anything more than Aluminex itself had over the additional asset, which was merely the right to acquire beneficial ownership to accompany the legal ownership of the glass, upon payment of the full purchase price therefor. One cannot pick out the benefit of an asset without also accepting the encumbrance on it.

(3) Although the legal title in the glass had passed to Aluminex on delivery, it was never for one moment the unencumbered property of Aluminex and was subject to the equitable charge in favour of UMBC. The debentures could only 'bite' if the glass had passed unencumbered to Aluminex, which it had not. In other words, the additional asset acquired by Aluminex, ie the glass, was

A subject ab initio to UMBC's security interest constituted by the assignment and the only interest Aluminex had acquired was the right to acquire beneficial ownership to accompany its legal ownership upon payment of the full purchase price to UMBC. The absence of a retention of title clause in the assignment was therefore irrelevant, especially since the assignment was a security for the advance for the purchase of the glass.

(4) Clause 14(s) of the debentures specifically permitted Aluminex to enter into any transaction in the ordinary course of business, on ordinary commercial terms, without having to obtain the consent of UAB. In issuing the assignment before the crystallization of the debentures without the consent of UAB, Aluminex was acting well within the license or power conferred upon it by the debentures.

(5) Although when UMBC took the assignment and registered it as a charge, it was aware of the existence of the prior registered debentures held by UAB, notice of a debenture creating a floating charge did not constitute notice of the terms thereof, including restrictive clauses forbidding the creation of later charges ranking in priority to or pari passu with the charge containing the clause.

(6) Whilst it was true that the legal title in the glass passed to Aluminex upon delivery pursuant to the contract of sale, Aluminex knew and consented to the glass being subject to the equitable charge in favour of UMBC. There was never any absolute sale of the glass to Aluminex, who took the glass subject to the rights of UMBC. All that Aluminex acquired was an interest in the equity of redemption. Therefore, the debenture holder, UAB, being in the position of an equitable assignee, could not be in a better position than the assignor, Aluminex.

(7) If, contrary to the court's primary view, the assignment did not give rise to an equitable charge in the glass in favour of UMBC as unpaid seller, then, upon the evidence of this case, the assignment amounted to a subsequent fixed charge in respect of the book debts of Aluminex, which took priority over the debenture of UAB, since the debenture had not crystallized at the date of the assignment and UMBC did not have express notice of the restrictive clauses in the debentures.

(8) UMBC was entitled to priority over UAB and the sum of RM285,811.88 held with UMBC, together with all interest accrued, was to be paid out to UMBC forthwith, in repayment of the advance granted by UMBC to Ming Sing.

(9) The balance sum of RM290,283.20 due under the sub-contract, together with all other sums due under the sub-contract (except the sum of RM285,811.88 and interest thereon), was to be paid by the main contractors (the second and the third defendants at first instance) to Aluminex. UMBC was allowed the costs of the proceedings, both of the appeal and in the court below and, the deposit for security for costs of the appeal was refunded to it.

Per curiam:

(1) Should the purchase money financier fail to take the precaution of obtaining a binding agreement for a mortgage before completion of the mortgage, there would be an instant of time (*scintilla temporis*) between the acquisition of the new asset by the debtor and the attachment of the subsequent purchase money security interest, so that the charge over after-acquired property clamps down at that instant, with the result that the purchase money financier takes subject to the interest of the holder of the charge over after-acquired property.

(2) The expression 'ordinary course of business' was not confined to what was, in fact, ordinarily done in the course of a particular business of the company, so that transactions would be within this principle even though, they be, in relation to the company, exceptional or unprecedented.

[Bahasa Malaysia summary

Responden pertama, Aluminex (M) Sdn Bhd ('Aluminex'), telah mengeluarkan dua debentur ('debentur itu') kepada responden kedua, United Asian Bank Bhd ('UAB'), sebagai balasan untuk kemudahan overdraf yang diberikan oleh UAB kepada Aluminex. Debentur itu telah diserah-simpan dan didaftarkan di Pejabat Pendaftaran Syarikat, dan memperuntukkan, antara lain, bahawa Aluminex tidak mempunyai kebebasan untuk mewujudkan, kecuali dengan persetujuan bertulis UAB, sebarang gadai-janji, debentur (sama ada tetap atau terapung), gadaian, sandaran atau lien yang berperingkat terdahulu atau pari passu dengan debentur itu.

Aluminex kemudiannya telah dipilih sebagai subkontraktor di bawah suatu kontrak pembinaan ('subkontrak itu') dan dikehendaki mereka, membekal dan memasang suatu dinding kaca dan skrin bersepuh tanpa bingkai. Berikutannya, Aluminex telah menyempurnakan suatu penyerahhakkan ('penyerahhakkan itu') kepada United Malayan Banking Corporation Bhd ('UMBC'), untuk menjamin pembayaran wang pendahuluan ('pendahuluan itu') yang diberikan kepada pembekal Aluminex, iaitu Ming Sing Glass Sdn Bhd ('Ming Sing'), untuk pembelian kaca yang akan digunakan oleh Aluminex dalam subkontrak itu. Penyerahhakkan itu memperuntukkan, antara lain, bahawa Aluminex menyerahhakkan subkontrak itu kepada UMBC secara mutlak dan semua wang yang kena dibayar kepada Aluminex di bawah subkontrak itu dan semua faedah, hak dan kelebihan yang terkandung dalam subkontrak itu. Penyerahhakkan itu telah didaftarkan sebagai suatu gadaian oleh Aluminex di Pejabat Pendaftaran Syarikat.

Mengikut kejadian yang berlaku, jumlah wang yang terhutang oleh Aluminex telah menyebabkan UAB melantik penerima dan pengurus di bawah debentur itu, dan dengan demikian menyebabkannya memperjelas. Perhatian penerima dan pengurus telah ditarik kepada fakta bahawa, di bawah penyerahhakkan itu, sejumlah RM285,811.88,

yang kena dibayar kepada Aluminex sebagai bayaran progresif di bawah sub-kontrak itu, telah dibayar kepada UMBC, yang telah menyimpannya dalam suatu akaun khas. Pada peringkat ini, suatu pertikaian antara UAB dan UMBC telah timbul mengenai prioriti gadaian yang telah diwujudkan oleh debentur itu untuk faedah UAB dan gadaian yang diwujudkan oleh penyerahhakkan itu untuk faedah UMBC.

Hakim pada pendengaran asal telah memutuskan pertikaian prioriti itu dengan memihak kepada UAB. [Lihat [1992] 1 MLJ 435.] UMBC telah membuat rayuan. Hujah peguambela UMBC bercabang dua, iaitu: (i) UMBC berhak untuk mendapatkan prioriti kerana kaca itu, pada setiap masa material, tertakluk kepada gadaian ekuiti yang memihak kepadanya; dan (ii) secara alternatif, penyerahhakkan itu merupakan suatu gadaian tetap ke atas hutang buku Aluminex yang mendapat prioriti atas debentur UAB kerana debentur itu belum lagi memperjelas pada tarikh penyerahhakkan itu dan UMBC tidak mempunyai notis nyata tentang sekatan di dalam debentur itu.

Diputuskan, membenarkan rayuan itu:

(1) Pendahuluan itu yang telah diberikan oleh UMBC kepada Ming Sing telah digunakan untuk membeli kaca itu daripada pembekal di Korea dan juga merupakan cara bagaimana Aluminex mendapatkan penyerahan kaca itu untuk tujuan memenuhi obligasinya di bawah subkontrak itu dan tanpanya, Aluminex tidak dapat berbuat demikian. Adalah jelas bahawa pendahuluan itu adalah suatu pendahuluan wang pembelian (purchase money advance) dan penyerahhakkan itu telah mewujudkan suatu cagaran untuk pembelian kaca itu.

(2) Pertimbangan isu prioriti yang melibatkan pemegang gadaian menggunakan suatu syarat mengenai harta yang diperolehi kemudiannya dan pemegang kepentingan cagaran wang pembelian, bergantung kepada urutan operasi kewangan itu. Walaupun debentur UAB terdahulu dan mengandungi sekatan ke atas kuasa Aluminex untuk mewujudkan gadaian kemudian yang berperingkat terdahulu, kecuali dengan persetujuan bertulis UAB, itu tidak memberi UAB dan penerima mereka suatu gadaian ke atas lebih daripada apa yang dipunyai oleh Aluminex ke atas aset tambahan itu, iaitu hak hanya untuk mendapat keempunyaan benefisial untuk mengiringi keempunyaannya di sisi undang-undang bagi kaca itu, atas pembayaran penuh harga belian. Seseorang itu tidak boleh memilih faedah sesuatu aset tanpa menerima bebanan di atasnya.

(3) Walaupun hakmilik di sisi undang-undang untuk kaca itu telah beralih kepada Aluminex pada penyerahannya, ia tidak pernah menjadi harta Aluminex yang tidak dibebankan dan adalah tertakluk kepada gadaian ekuiti UMBC. Debentur itu hanya boleh 'menggigit' jika kaca itu telah beralih kepada Aluminex bebas daripada sebarang bebanan, dan ia tidak beralih sedemikian. Dalam perkataan lain, aset tambahan yang diperolehi

oleh Aluminex, iaitu kaca itu, tertakluk ab initio kepada kepentingan cagaran UMBC yang didirikan oleh penyerahhakkan itu dan kepentingan yang diperolehi oleh Aluminex hanyalah hak mendapat keempunyaan benefisial untuk mengiringi keempunyaannya di sisi undang-undang atas pembayaran penuh harga belian kepada UMBC. Oleh itu, ketidakhadiran suatu fasal penyimpan hakmilik tidak relevan, lebih-lebih lagi kerana penyerahhakkan itu adalah suatu jaminan untuk pendahuluan itu bagi pembelian kaca itu.

(4) Fasal 14(s) debentur itu dengan spesifik membenarkan Aluminex memasuki sebarang transaksi dalam menjalankan perniagaan biasa, pada terma komersil yang biasa, tanpa memerlukan persetujuan UAB. Dengan mengeluarkan penyerahhakkan itu sebelum perjelasan debentur itu tanpa persetujuan UAB, Aluminex telah bertindak mengikut lesen atau kuasa yang diberikan kepadanya oleh debentur itu.

(5) Walaupun apabila UMBC mengambil penyerahhakkan itu dan mendaftarkannya sebagai suatu gadaian, ia tahu tentang kewujudan debentur berdaftar yang terdahulu itu yang dipegang oleh UAB, notis tentang debentur yang mewujudkan gadaian terapung tidak merupakan notis tentang terma di dalamnya, termasuk fasal penyekat yang menghalang pewujudan gadaian kemudian yang berperingkat terdahulu atau pari passu.

(6) Walaupun ianya benar bahawa hakmilik di sisi undang-undang berkenaan dengan kaca itu telah beralih kepada Aluminex pada penyerahan kaca itu di bawah kontrak penjualan, Aluminex tahu dan bersetuju bahawa kaca itu tertakluk kepada gadaian ekuiti UMBC. Tidak terdapat sebarang penjualan mutlak kaca itu kepada Aluminex, yang mengambil kaca itu tertakluk kepada hak UMBC. Apa yang diperolehi oleh Aluminex adalah kepentingan dalam ekuiti penebusan. Oleh itu, pemegang debentur itu, UAB, yang berada dalam kedudukan pemegang serahhak, tidak mungkin berada dalam kedudukan yang lebih baik daripada penyerahhak, iaitu Aluminex.

(7) Jika, bertentangan dengan pendapat utama mahkamah, penyerahhakkan itu tidak mewujudkan suatu gadaian ekuiti untuk UMBC sebagai penjual yang belum dibayar, berdasarkan keterangan di dalam kes ini, penyerahhakkan itu sama seperti suatu gadaian tetap kemudian ke atas hutang buku Aluminex, yang mengambil prioriti ke atas debentur UAB, kerana debentur itu belum lagi memperjelas pada tarikh penyerahhakkan itu dan UMBC tidak mempunyai pengetahuan nyata tentang fasal penyekat di dalam debentur itu.

(8) UMBC berhak mendapat prioriti berbanding dengan UAB dan jumlah RM285,811.88 yang dipegang oleh UMBC, termasuk faedah yang terakru, mesti dibayar kepada UMBC dengan serta-merta sebagai pembayaran balik pendahuluan itu yang telah diberikan oleh UMBC kepada Ming Sing.

(9) Baki sebanyak RM290,283.20 yang kena dibayar di bawah

subkontrak itu (kecuali jumlah RM285,811.88 dan faedah ke atasnya), mesti dibayar oleh kontraktor utama (defendan kedua dan ketiga di tindakan asal) kepada Aluminex. UMBC dibenarkan kos prosiding untuk kedua-dua rayuan ini dan di mahkamah bawah, dan deposit untuk jaminan kos rayuan dibayar balik kepadanya.

Per curiam:

(1) Jika pembiaya wang pembelian gagal mengambil langkah berjaga-jaga dengan mengikat perjanjian untuk gadai-janji sebelum penyelesaian gadai-janji itu, akan berlaku seketika masa (*scintilla temporis*) di antara perolehan aset baru oleh penghutang dan kepilan kepentingan cagaran wang pembelian, dan gadaian ke atas harta yang diperolehi kemudiannya akan diapitkan pada ketika itu, dengan akibat bahawa pembiaya wang pembelian itu akan mengambil kepentingannya tertakluk kepada kepentingan pemegang gadaian ke atas harta yang diperolehi kemudiannya itu.

(2) Ungkapan 'ordinary course of business' tidak terhad kepada apa yang sebenarnya dilakukan dalam menjalankan sesuatu perniagaan tertentu sebuah syarikat, dan dengan itu, urusan mungkin termasuk dalam prinsip ini walaupun ia adalah luar biasa ataupun tidak pernah berlaku di dalam syarikat itu.]

Notes

For cases on security for advances, see 1 *Mallal's Digest* (4th Ed) para 902.

Cases referred to

1 *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989; [1976] 3 All ER 570 (folld)
2 *Wilson v Kelland* [1910] 2 Ch 306 (folld)
3 *Re Connolly Bros Ltd (No 2)* [1912] 2 Ch 25 (refd)
4 *Security Trust Co v Royal Bank of Canada* [1976] AC 503; [1976] 1 All ER 381; [1976] 2 WLR 437 (refd)
5 *Church of England Building Society v Piskor* [1954] 1 Ch 553; [1954] 2 All ER 85; [1954] 2 WLR 952 (refd)
6 *Reynold Brothers (Motor) Pty Ltd v Esanda Ltd* (1983) 1 ACLC 1333 (refd)
7 *Clough Mill Ltd v Martin* [1984] 3 All ER 982; [1985] 1 WLR 111 (distd)
8 *Rother Iron Works Ltd v Canterbury Precision Engineers Ltd* [1974] QB 1; [1973] 1 All ER 394; [1973] 2 WLR 281 (refd)
9 *NW Robbie & Co Ltd v Witney Warehouse Co Ltd* [1963] 1 WLR 1324 (refd)
10 *George Barker (Transport) Ltd v Eynon* [1974] 1 WLR 462; [1974] 1 All ER 900 (refd)
11 *English and Scottish Mercantile Investment Co v Brunton* [1892] 2 QB 700 (folld)
12 *Re Castel & Brown Ltd* [1898] 1 Ch 315 (folld)

13 *Re Valletort Sanitary Steam Laundry Co Ltd* [1903] 2 Ch 654 (folld)
14 *G & T Earle Ltd v Hemsworth RDC* (1928) 44 TLR 605 (folld)
15 *Matheson v Wahlen* (1928) SR (NSW) 189 (folld)
16 *Re Bunbury Foods Pty Ltd* (1984) 2 ACLC 639 (refd)
17 *Shipley v Marshall* (1863) 14 CBNS 566 (refd)
18 *Independent Automatic Sales Ltd v Knowles & Foster* [1962] 3 All ER 27; [1962] 1 WLR 974 (refd)

Legislation referred to
American Uniform Commercial Code s 9–107

Appeal from: Civil Suit No D3–24–17–1989 (High Court, Kuala Lumpur)

Sharmini Navaratnam (*Rashid & Lee*) for the appellant.
K Ananthan (*Skrine & Co*) for the respondents.

Cur Adv Vult

Edgar Joseph Jr SCJ (delivering the judgment of the court): The issue of central importance to this appeal concerns the resolution of a priority dispute between two banks.

The history of the matter concerning the two competing securities which calls for the consideration of this court, may be stated thus:

On 29 March 1982, in consideration of the second respondent, the United Asian Bank Bhd ('UAB'), granting to the first respondent, Aluminex (M) Sdn Bhd ('Aluminex') overdraft facilities, Aluminex had issued to UAB a debenture ('the debenture') creating a floating charge over all its property, present and future, the debenture specifically providing that Aluminex was not to be at liberty to create, save with the written consent of UAB, any other mortgage, debenture (whether fixed or floating), charge, pledge or lien ranking in priority to or pari passu to the debenture. The debenture was lodged and registered at the Registry of Companies, Kuala Lumpur, on 13 September 1982 pursuant, to s 108 of the Companies Act 1965 ('the Act').

Again, on 21 March 1984, in consideration of UAB increasing the limit of the overdraft facilities, Aluminex had issued to UAB a second debenture ('the supplemental debenture'), creating a floating charge over all its property, present and future, the supplemental debenture also providing that Aluminex was not to be at liberty to create, save with the written consent of UAB, any other mortgage, debenture, etc ranking in priority to or pari passu to the debenture. The supplemental debenture was lodged and registered at the Registry of Companies, Kuala Lumpur, on 23 May 1984, pursuant to s 108 of the Act.

For brevity and convenience, we shall, where the context so requires, when referring to the debenture and the supplemental debenture collectively,

refer to them as 'the debentures'.

Now, in 1986, the second and the third defendants, Takenaka Komuten Co Ltd ('Takenaka') and Pembinaan Maluri Sdn Bhd ('Pembinaan Maluri'), respectively, in the court below, but who are not parties to this appeal, were jointly the main contractors under a building contract for the construction of the headquarters building for Bank Pembangunan Malaysia Bhd, and had, on 18 April 1986, appointed Aluminex as the sub-contractor for the design, supply and installation of a glass curtain walling and frameless glazed screen, for that building. This sub-contract ('the sub-contract') was worth precisely RM4,688,177.

To carry out its obligations under the sub-contract, Aluminex entered into a contract of sale and purchase ('the contract of sale') with Ming Sing Glass Sdn Bhd ('Ming Sing') for the supply of glass. The contract of sale was worth precisely RM2.3m. But, to get that glass, Ming Sing had to rely on Korean suppliers. So, Ming Sing applied to the appellant, United Malayan Banking Corporation ('UMBC'), for a loan to enable it to pay its Korean suppliers.

By their letter of offer dated 15 September 1986, addressed to Ming Sing ('the facility letter'), UMBC had offered to grant to Ming Sing the financial assistance they sought, the facilities to be granted being described as a 'letter of credit/trust receipt (LC/TR)' facility ('the facility'), on certain terms, which included the following:

Security:	The above facility is to be secured against assignment of the proceeds of the sub-contract awarded to Aluminex (M) Sdn Bhd ('Aluminex') valued at RM4,688,177 in favour of our bank. Aluminex is to open a collection account with us for this purpose.
Other terms and conditions:	Please take note that you are to obtain a letter of undertaking from the principal contractor, Takenaka Maluri Joint Venture to pay the proceeds of the contract directly to Aluminex's collection account with us. The portion of the moneys paid in respect of work done by your company, ie 50% of the proceeds of the sub-contract awarded to Aluminex, is to be used to settle the above letter of credit/trust receipt facility.

Pursuant to the facility letter, Ming Sing issued trust receipts in favour of UMBC, by the terms of which they were deemed to hold the glass in trust for UMBC but they were allowed to sell the glass on condition that they received and retained the proceeds of sale as trustees for UMBC and they had also to keep such proceeds separate and apart from their other moneys and then to promptly pay them over to UMBC. It was further provided, in each of the trust receipts, that UMBC was the owner of the glass and that in effecting the sale of the glass, Ming Sing would be acting as agents for UMBC; this was, of course, a provision which was merely declaratory of the effect, in law, of the issue of a trust receipt.

That, however, was not the end of the matter, because, in addition, UMBC required an additional security for granting the loan to Ming Sing, and this was to take the form of an assignment in their favour, by Aluminex, of the sub-contract awarded to Aluminex and the proceeds payable

thereunder, and, in furtherance thereof, Aluminex was to open a collection account with them.

Consequently, on 16 October 1986, Aluminex executed a document described as a loan agreement cum assignment, being exh A4 to encl 2, ('the assignment'). In the three recitals of the assignment, mention was made by way of introductory, of the relationship between the parties thereto, that is to say, Aluminex as assignor, UMBC as assignee and Ming Sing as borrower; that Aluminex had been awarded the sub-contract, that Aluminex had requested UMBC to grant to Ming Sing the facility up to a limit of RM2.3m upon the security of an assignment of the sub-contract and all moneys which may have then or thereafter become payable to Aluminex and all benefits and advantages therein created, upon the terms therein set forth.

It was provided in the body of the assignment that, for the consideration aforesaid, Aluminex 'absolutely assigns unto UMBC the sub-contract and all moneys which may now or hereafter become due and payable to (Aluminex) pursuant to and under the (sub-contract) and all benefits, rights and advantages therein and all arrangements and all certificates and documents ... which may be necessary to enable UMBC to recover all the abovesaid moneys or any instalments or part thereof' (cl 2).

The effect of the assignment was to continue to remain in full force and effect until UMBC had been fully paid all moneys owing to it by Ming Sing under the facility.

It was further provided that Aluminex and/or Ming Sing expressly undertook to furnish UMBC with copies of all progress payment claims showing the various stages of completion of the sub-contract and all moneys as and when they became due and payable to Aluminex under the sub-contract (cl 9).

It was also provided that the assignment was expressly intended to be a continuing security for all moneys owing to UMBC by Ming Sing (cl 11).

It was lastly provided that the assignment was to be binding upon the liquidators, receivers, assignees and successors-in-title of the parties (cl 31).

The assignment was registered as a charge by Aluminex with the Registry of Companies, Kuala Lumpur, on 12 November 1986, pursuant to s 108 of the Act.

At this point, we would interject to observe, that it was not disputed, either before us or in the court below, that the assignment was an absolute assignment within the meaning of s 4(3) of the Civil Law Act 1956. Accordingly, this judgment is written on the basis that the assignment was an absolute assignment within the meaning of s 4(3).

To resume the narrative of events, UMBC went further in its quest for security and also obtained from the main contractors aforesaid a letter of undertaking dated 2 October 1986 ('the letter of undertaking'), addressed to the manager of UMBC, which confirmed that they had no objection to Aluminex executing the assignment in their favour and undertaking 'to remit all moneys and payments due under the sub-contract directly to UMBC and that all cheques representing the same would be paid into Aluminex's "collection account" with UMBC'.

In the upshot, UMBC provided the facility to Ming Sing, the Korean

suppliers then delivered the glass to Ming Sing which, in turn, delivered the same to Aluminex, which utilized it in fulfilment of its obligations under the sub-contract with the main contracts to design, supply and install the glass curtain walling and frameless glazed screens for the headquarters building of Bank Pembangunan Malaysia Bhd. But, Ming Sing had never been paid for the glass.

In the events which transpired, as at 24 September 1987, the amounts due and owing by Aluminex to UAB, were such as to cause UAB to appoint, on that date, receivers and managers under the debentures, thereby causing them to crystallize. The attention of the receivers and managers was then drawn to the fact that, pursuant to the letter of undertaking issued by the main contractors and the assignment issued by Aluminex, both in favour of UMBC, a sum of RM285,811.88 payable to Aluminex as progress payments under Progress Payment Certificates Nos 34 and 35 issued under the sub-contract, had been paid to UMBC who, in turn, had paid the same into an account specially earmarked for this purpose, and designated under the letter of undertaking as 'United Malayan Banking Corporation Bhd for account of Aluminex (M) Sdn Bhd — A/C No 0235105268'.

It was at this point that the dispute between the second respondent, UAB, and the appellant, UMBC, relating to the respective priorities of the charges created by the debentures issued in favour of UAB and the charge created by the assignment issued in favour of UMBC, erupted. And so, it was agreed, by both UAB and UMBC that the amount at stake, to wit, the sum of RM285,811.88, be placed on fixed deposit with UMBC and there to be held until determination of an originating summons taken out by the receivers and managers of Aluminex (the first respondent which was the first plaintiff in the court below) and UAB (the second respondent which was the second plaintiff in the court below) citing UMBC (the appellant), Takenaka and Pembinaan Maluri, as the first, second and third defendants, respectively.

The reliefs sought by the originating summons were these:

(i) that there be a declaration that UMBC be deemed to have notice of the contents of the deed of debenture dated 29 March 1982 made between Aluminex and UAB, in particular cll 9(b), 14 and/or 18 thereof, by virtue of the registration and lodgement of a copy of the debenture with the Registrar of Companies;

(ii) that UMBC be deemed to have notice of the contents of the supplemental debenture dated 21 March 1984 between Aluminex and UAB, in particular cll 9(c), 14 and/or 18 thereof by virtue of the registration and lodgement of a copy of the supplemental debenture with the Registrar of Companies;

(iii) that the interest of UMBC in the assignment of the moneys, benefits and advantages in the sub-contract dated 18 April 1986 between the Aluminex and Takenaka and Pembinaan Maluri, pursuant to the loan agreement cum assignment dated 16 October 1986 between Aluminex and UMBC, be subject to the interest of UAB as contained in the debenture and the supplemental debenture;

(iv) that the sum of RM285,811.88 now placed by UMBC in a fixed

deposit account be released to Aluminex forthwith;

(v) that all interest accrued on the said sum of RM285,811.88 also be for the account of Aluminex and be also released to Aluminex forthwith;

(vi) that the balance sum of RM290,283.20 due on 31 July 1988 under the sub-contract dated 18 April 1986 between Aluminex and Takenaka and Pembinaan Maluri be paid by Takenaka and Pembinaan Maluri to Aluminex forthwith, together with all other sums as may have become due under the sub-contract; and

(vii) that the costs of the application be paid by the defendants to Aluminex, such costs to be borne by the defendants in equal proportions.

The learned judge (VC George J), having recited the sequence of the above financial transactions, concluded that:

> In the face of the debentures, with particular reference to cll 9(b) and 18 in the first and the equipollent clauses in the second, Aluminex could not properly assign its interest in the sub-contract without the written consent of UAB and because UMBC is deemed to have had notice of the debentures and of those clauses in particular, they have to get behind UAB in the queue.

In the event, the learned judge determined the priority dispute in favour of UAB and made the further orders consequential thereto [see [1992] 1 MLJ 435] and, from that judgment, UMBC has appealed to this court.

Broadly stated, the question which arises for decision in this appeal is whether the learned judge was right in so holding.

Before us, the submissions of counsel for UMBC were twofold; and, in summary, they were as follows:

(1) UMBC was entitled to priority since the glass was, at all material times, subject to an equitable charge in its favour; and

(2) alternatively, the assignment amounted to a subsequent fixed charge in respect of the book debts of Aluminex, which takes priority over the debentures of UAB, since the debentures had not crystallized at the date of the assignment and UMBC did not have express notice of the restrictions in the debenture and the supplemental debenture.

In amplification, counsel for UMBC's submission is summarized in a written submission thuswise:

> ... the assignment, in effect, evidences an equitable charge in favour of UMBC in respect of the unpaid purchase price.
>
> The equitable charge is created in respect of the glass.
>
> The glass delivered to Aluminex was never at any one point in time unencumbered. Notwithstanding that legal title in the glass had passed to Aluminex, it was always subject to the equitable charge in favour of UMBC. The debenture can only bite if the glass had passed unencumbered to Aluminex. Here, the assignment was entered into before the glass was delivered to Aluminex. Therefore, as Professor RM Goode has argued in his article, 'The After-Acquired Property Clause and the Subsequent Purchase-Money Security Interest', in his book *Legal Problems of Credit Security* (1982), the doctrine of *scitilla temporis* is highly unsatisfactory and it is time that English law got round to upholding the priority of purchase-money security interest before exchange of contracts. Here, the purchase-money security interest was created before the goods were delivered.

The assignment was created before the glass was delivered, so it is clear that the glass was never for one moment the unencumbered property of Aluminex and the debenture could not therefore give a charge on it. Therefore, it is the UMBC's contention that the absence of a retention of title clause is irrelevant in the light of the fact that UMBC obtained an assignment from Aluminex, it being clear that the assignment was a security for the advance of money for the purchase of the glass...

Alternatively, this case *falls squarely within the example as set in problem 7* which appears in Prof RM Goode's article 'Fixed And Floating Charges: Some Problems of Priority' in his book *Legal Problems of Credit and Security* (1982). (See p 80 of the reply.)

> 'Problem 7
>
> Debtor gives a floating charge over book debts to A, then sell or grants a fixed charge over the debts to B.
>
> B wins, unless the charge in favour of A precludes the debtor from granting a subsequent fixed charge ranking in priority to or pari passu with A's floating charge and B takes his charge with notice of the restriction on subsequent charges. For this purpose, entry of the restriction on the register does not constitute notice unless B searches the register.'

In the instant case, the assignment was a fixed charge on the future book debts of Aluminex. There is no evidence that the negative pledge clauses were recorded in the particulars of charge filed with the Registry of Companies. Further, there is no evidence that UMBC had actual knowledge of the negative pledge clauses or that cll (2)(b), 9(b), 14(f) and(t) and 18 were recorded in the particulars of charge filed via Form 34. It is pertinent to note that the burden of proof rests with UAB. Accordingly, the court should hold that UMBC has priority over 50% of the proceeds of the sub-contract.

In responding to the arguments of counsel for UMBC that the assignment gave rise to an equitable charge in favour of UMBC as an unpaid seller, counsel for UAB and Aluminex reminded us of the principles governing priority of charges and these, according to his written submission dated 2 September 1992, were as follows:

(a) A registered charge has priority over a subsequent registered charge (p 135 of UMBC's bundle of authorities).

(b) While a floating charge still floats, the company cannot create a second floating charge over its undertaking ranking before the first, even though the debenture creating the first floating charge expressly empowers the company to 'deal with its property as it may think fit and, in particular, to mortgage and sell the same or any part thereof' (p 138 of UMBC's bundle of authorities).

Commentary: On the facts of our case, cll 2(b), 9(b), 14(f) and (t) and 18 do not permit Aluminex to even mortgage any of its assets. Aluminex is only allowed to enter into transactions in the ordinary course of business (cl 14(s)).

(c) Where the floating charge prohibits the company from creating specific mortgages or floating charges which rank for repayment before the debenture debt, or equally with it, such a provision is *not only an agreement* by the company not to create such mortgages but also an equitable restriction on its power to do so. A later mortgagee who takes a mortgage with notice of the provision will be postponed to the debenture holder — last paragraph of

p 138 of UMBC's bundle of authorities. On our facts, cl 9(b) read with cll 14(f) and 18 clearly prohibit the creation of a charge on any particular asset and the sharing of the income from the sub-contract with the third party.

(d) A restriction in a debenture on the company's power to create later prior-ranking mortgages does not affect the priority of a mortgage of property to secure a loan with which the purchase price of the property is paid. This proposition appears as proposition (2) at p 154 of UMBC's bundle of authorities.

He then argued that the true issue was whether UMBC had successfully brought itself within the terms of rule (d). To do so, said counsel, UMBC would have to demonstrate that the assignment conferred an equitable charge in the glass in favour of UMBC for the balance of the purchase price.

Turning to the facts of the instant case, para 14 of counsel's written submission dated 2 September 1992 was as follows:

> ... UMBC choose not to retain an interest in the glass until the payment of the purchase price but, instead, obtained as security, the assignment of the contract sum. This finding of the judge, at pp 7F and 8A-F of the appeal record, is not challenged. At no time did UMBC seek to retain an interest in the glass. The trust receipt did not do this and the judge was not asked to make a finding that the assignment did this. On the contrary, the judge's finding was that the glass was a fixture belonging to Bank Pembangunan. This finding has also not been challenged.
>
> In any event, the assignment was not of the proceeds of sale but of the contract sum resulting from the design, supply and installation of the glass by the Aluminex. Goff LJ in *Clough Mill Ltd v Martin* [1984] 3 All ER 982, at p 12G–J of Aluminex and UAB's bundle of authorities, said that where there was a mixing of the goods, then the new product vested in the buyer in the absence of a retention of title clause. UMBC's reliance on the letter of offer dated 15 September 1986 originating from UMBC, at p 55 of the appeal record, to establish a promise by Aluminex to create a charge is devoid of merit as this letter was not even addressed to Aluminex.

Counsel for UAB and Aluminex then concluded that, in the ultimate analysis, the only issue in this case was, which of two registered charges should prevail, bearing in mind that UMBC concedes that the assignment is a charge (see s 108(3)(d) of the Act). The answer, he said, was that the first in time enjoys priority and, on the facts, he urged that this happens to be UAB. Nor, he added, could UMBC be heard to complain about this because when it took the assignment and registered a charge with the Registry of Companies, Kuala Lumpur, by its own admission it was aware of the prior registered charge.

We must now address the issue of critical substance in this appeal and that is: what were the relative priorities of UAB's charge created by the debenture and the supplemental debenture and UMBC's charge created by the assignment?

We propose to deal with certain key topics which arise on this appeal before determining the priority dispute referred to in the opening paragraph of this judgment.

Was UMBC's advance to Ming Sing, a purchase money advance?

We must begin by identifying the precise nature of the transaction which UMBC, Aluminex and Ming Sing undertook as evidenced by the contemporary documents in the case, to wit, UMBC's facility letter dated 15 September 1986 addressed to Ming Sing, the letter of undertaking dated 2 October 1986 by the main contractors addressed to UMBC, the assignment dated 16 October 1986, the parties to which were Aluminex, UMBC and Ming Sing and the trust receipt 27 January 1987, executed by Ming Sing in favour of UMBC. In doing so, some degree of repetition will be inevitable.

The evidence relevant to the transaction that resulted in the execution of the contemporary documents aforesaid is undisputed.

To recapitulate, that evidence disclosed that Aluminex had issued the debentures to UAB which were duly registered, Aluminex then entered into the sub-contract with the main-contractors for 'the design, supply and installation of glass curtain walling and frameless glazed screens' for the headquarters building of Bank Pembangunan Malaysia Bhd, and to fulfil its contractual obligations under the sub-contract, Aluminex in turn entered into the contract of sale with Ming Sing for the supply of the required glass, and Ming Sing in turn were relying on Korean suppliers for the glass.

However, Ming Sing, not having had the necessary funds for the purchase of the glass, had to rely on UMBC for those funds, and this, UMBC was willing to provide, subject to compliance with the terms contained in their facility letter dated 15 September 1986. These terms included the execution of the assignment by Aluminex as assignor, and Ming Sing as borrower, in favour of UMBC as assignee.

The assignment, it will be recalled, was duly registered as a charge with the Registry of Companies, Kuala Lumpur on 12 November 1986, UMBC then provided the financial facility to Ming Sing, the Korean suppliers having been paid by means thereof, supplied the glass to Ming Sing and the glass was utilized by Aluminex in fulfilment of its obligations under the sub-contract. Ming Sing, it will be recalled, have not been paid for the glass.

Upon the undisputed facts aforesaid, it is beyond argument that the advance made by UMBC to Ming Sing was intended to be used, and was in fact used, by Ming Sing to acquire the glass from the Korean suppliers. It was also the means whereby Aluminex obtained delivery of the glass from Ming Sing for purposes of fulfilling its obligations under the sub-contract and, without which, Aluminex could not have done so.

Clearly, therefore, the advance by UMBC was a purchase money advance.

Did the assignment create a purchase money security interest?

The term 'purchase money security interest' is borrowed from s 9–107 of the American Uniform Commercial Code:

> A security interest is a 'purchase money security interest' to the extent that it is:
> ...
>
> (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value

is in fact so used.

We have already noted, when referring to the main provisions of the assignment styled as a loan cum assignment agreement, that it was specifically provided, inter alia, that the assignment was to remain in full force and effect until the facility in respect of the purchase of the glass had been fully paid. Counsel for UAB has sought to draw a distinction between 'the facility' and 'the purchase price of the glass', but this overlooks the point that the facility was to finance the purchase of the glass and the judge had so found on the facts. Without that facility, Aluminex would not have been able to fulfil its obligations under the sub-contract and without the protection of a purchase money security interest, UMBC would not have advanced the facility at all. Undoubtedly, UMBC required the execution of the assignment by Aluminex so as to create a charge, since upon delivery of the glass to Aluminex, the latter could be the legal owner of it and so could reasonably be expected, in due course, to be entitled to the progress payments due to it upon fulfilling its obligations under the sub-contract.

In our view, the assignment, like any other document, must be construed reasonably; it must be construed not only by the words used but also with due regard to the surrounding circumstances, (see s 92(f) of the Evidence Act 1950), not forgetting the other contemporary documents.

That was the approach adopted by Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tangen*,[1] when he said [at p 995]:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the backgound, the context, the market in which the parties are operating.

And, he continued [at p 997]: '... what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were'.

Now, although Aluminex had, by the assignment, assigned all progress payments due to it under the sub-contract, it is obvious upon a reading of the facility letter dated 15 September 1986 from UMBC to Ming Sing (and this we consider should be read together with the assignment, it being part of the surrounding circumstances), that the assignment was to secure repayment by Aluminex of only 50% of the sub-contract sum (RM2.3m or the value of the glass). Be it noted, the facility letter made it clear that only 50% of the sub-contract sum (RM2.3m or the value of the glass) was payable to UMBC through the account opened by Aluminex with UMBC.

So construed, we find that the facility given by UMBC to Ming Sing was in respect of the purchase of the glass from Korea and the assignment had created a security for the purchase of the glass.

What was the nature of the priority dispute in this case?

In our view, having regard to the contents of the contemporary documents

A and the surrounding circumstances in relation thereto, the priority issue in this appeal involves a prior chargee (UAB) invoking an after-acquired property clause, and a holder of the purchase money security interest (UMBC).

In a contest between the holder of a charge over after-acquired property and the holder of a purchase money security interest taken to secure the B price of an asset falling within the ambit of the class defined by the after-acquired property clause, the merits would appear to lie with the holder of the purchase money security interest; after all, it was he who provided the necessary financial assistance required to purchase the after-acquired property and it would appear to be neither right nor fair that the holder of the charge C over after-acquired property could now, as it were, scoop up the asset or its proceeds to the exclusion of his opponent.

But, our research into the authorities shows that, neither in England nor in Australia, is there any policy for the protection of the holder of the purchase money security interest; instead, the approach adopted by the courts there in resolving the dispute, is a technical one, everything depending D upon whether the equitable rights of the holder of the purchase money security interest, be he mortgagee or chargee under the contract to make the loan advance, attaches to the property before the borrower company concerned acquires the legal ownership of it on completion of the purchase.

If so, the purchase money security interest attaches to the asset free from E encumbrances and so the rights which it confers have priority in point of time over the equitable rights of ths holder of the prior floating charge created by the debenture, notwithstanding a restriction in the debenture on the borrower company's power to create later prior-ranking mortgages or charges. This is so whether the mortgage is in favour of the vendor (see *Wilson v Kelland*[2]) or a third party (see *Re Connolly Bros Ltd (No 2)*[3]), and F in neither case would the mortgagee or chargee be affected by the restriction even if he knows about it.

In *Re Connolly Brothers*,[3] what happened was this:

A company issued debentures to M1, creating a floating charge over all its property, present and future, the debenture providing that the company G was not to be at liberty to grant any other mortgage or charge in priority to the debenture. Subsequently, the company applied for a loan to M2 to enable it to purchase certain premises and agreed to give M2 a charge on the property purchased. The company then entered into a contract to buy the premises, and the purchase was subsequently completed with the advance provided by M2, with whom the title deeds were deposited as security. A H memorandum of deposit was subsequently drawn up and executed by the company in favour of M2.

In *Re Connolly*,[3] emphasis was placed on the fact that the agreement for security preceded completion of the purchase, and it is not clear whether the date of exchange of contracts for the purchase of the property was I regarded as relevant. But, Cozens-Hardy MR said [at p 31]:

> In my opinion we should be shutting our eyes to the real transaction if we were to hold that the unincumbered fee simple in the property was ever in the company so that it became subject to the charge of the debenture-holders.

In *Wilson v Kelland*,[2] the purchase price of the new property was not advanced by a third party but was left outstanding by the vendors, who were held to have priority over an earlier debenture because the purchased property had been continuously subject to their equitable lien as unpaid vendors before the execution of a legal mortgage in their favour.

More recently, the case of *Re Connolly Brothers*[3] was followed by the Judicial Committee of the Privy Council in *Security Trust Co v Royal Bank of Canada*[4] where a receiver had purchased property on terms that it was mortgaged back to the vendor and the vendor was held to have priority over the debenture holder who had appointed the receiver.

On the other hand, should the purchase money financier fail to take the precaution of obtaining a binding agreement for a mortgage before completion of the mortgage, there would be an instant of time (*scintilla temporis*) between the acquisition of the new asset by the debtor and the attachment of the subsequent purchase money security interest, so that the charge over after-acquired property clamps down at that instant, with the result that the purchase money financier takes subject to the interest of the holder of the charge over after-acquired property. This is well illustrated by *Church of England Building Society v Piskor*,[5] where what happened was this:

The borrowers, on being let into possession of certain premises before completion, purported to grant weekly tenancies. The day the purchase was completed, the premises were charged by way of legal mortgage to a building society. The Court of Appeal held that the assignment and the legal charge could not be regarded as one indivisible transaction; for a moment of time a legal estate in the premises had vested, of necessity, in the borrowers before they could execute the legal charge, and the estoppel created in favour of the tenants was fed by the legal estate which had vested in the borrowers so that the tenants had priority over the building society.

Lord Evershed MR said at p 561:

> It is no doubt true to say that in one sense the transaction was one transaction; but it is equally true to say that it consists necessarily of certain defined steps which must take place in a certain defined order, if the result intended is eventually to be achieved. That seems to me not an artificiality, but a necessary result of the law and of the conveyancing practice which was involved.

The determination of the priority issue involving the prior chargee invoking an after-acquired property clause and the holder of the purchase money security interest must therefore depend upon a minute examination of the sequence of the financing operations. It is this question which we must next consider.

What was the sequence of the financing operations and what was their effect in law?

The assignment had been created by Aluminex *before* the crystallization of both the debentures, *before* the glass was delivered to Aluminex and, indeed, *before* completion of the purchase of the glass, so that although the legal title in the glass had passed to Aluminex on delivery, it was never for one moment the unencumbered property of Aluminex and so was subject to the

A equitable charge in favour of UMBC. The significance of this in relation to the dispute as to priorities was that the debentures could only 'bite' — to use the expression employed by the Judicial Committee of the Privy Council in *Security Trust v Royal Bank of Canada*[4] — if the glass had passed unencumbered to Aluminex, which it had not. In other words, the additional asset acquired by Aluminex — in this case, the glass — was subject ab initio B to UMBC's security interest constituted by the assignment and the only interest Aluminex had acquired was the right to acquire beneficial ownership to accompany its legal ownership of the glass upon payment of the full purchase price to UMBC. The absence of a retention of title clause in the assignment is therefore irrelevant, especially since the assignment was a C security for the advance of money for the purchase of the glass.

Did the issue of the assignment by Aluminex without the prior consent of UAB contravene cl 14(s) of the debentures?

Another point to note, arising from the fact that the assignment was issued D by Aluminex in favour of UMBC *before* the crystallization of UAB's debenture and supplemental debenture, was that cl 14(s) of both the debentures specifically permitted Aluminex to enter into any transaction with any firm or company in the ordinary course of business, on ordinary commercial terms, without the necessity of having to obtain the consent of UAB.

The question arises whether the issue of the assignment by Aluminex E without the consent of UAB was within the license or power given to Aluminex by cl 14(s). There is authority for saying that the expression 'ordinary course of business' is not confined to what is, in fact, ordinarily done in the course of a particular business of the company so that transactions will be within this principle even though, they be, in relation to the company, F exceptional or unprecedented. (See, eg *Reynold Brothers (Motor) Pty Ltd v Esanda Ltd.*[6])

We consider that there is nothing abnormal in sub-contractors in the construction field assigning the proceeds of work done as a mode of payment for the supply of raw materials and indeed, it is common for them to do so. In our view, therefore, in issuing the assignment before the G crystallization of the debentures without the consent of UAB, Aluminex was acting well within the license or power conferred upon it by the debentures.

Do the principles enunciated by Goff LJ in the case of Clough Mill Ltd v Martin H *assist UAB?*

We hasten to add that we have not overlooked counsel for UAB's submission that, in any event, the assignment was not of the proceeds of sale but of the contract sum resulting from the design, supply and installation of the glass by Aluminex and that when, as here, there was a mixing of the goods then I the new product vested in the buyer, in the absence of a retention of title clause. In particular, our attention was directed to the following passage in the judgment of Robert Goff LJ (as he then was) in *Clough Mill Ltd v Martin*[7] at p 989G:[7]

> Now, it is no doubt true that, where A's material is lawfully used by B to create new goods, whether or not B incorporates other material of his own, the property in the new goods will generally vest in B, at least where the goods are not reducible to the original materials. But it is difficult to see why, if the parties agree that the property in the goods shall vest in A, that agreement should not be given effect to.

But, on the undisputed facts of the instant case, was there a manufacture of a new item or a mixing of goods whereby the new product was vested in Aluminex?

We would repeat that, in construing the assignment, no evidence is admissible to contradict or vary its terms except that, by reason of proviso (f) to s 92 of the Evidence Act 1950, evidence was admissible to show in what manner the assignment was related to the existing facts. In other words, the assignment would have to be construed not only by having regard to the words appearing therein, but also with regard to the surrounding circumstances.

What then were the surrounding circumstances?

The assignment was an absolute assignment of the sub-contract; not just an assignment of all moneys due and payable to Aluminex under the sub-contract for the design, supply and installation of curtain walling and frameless glazed screens. But, clearly, the sub-contract for the design, supply and installation of glass curtain walling and frameless glazed screen involved two elements; namely, the price of the glass and the value of the work to be done. The glass was therefore merely installed by Aluminex in accordance with the requirements of the sub-contract. If the facility letter dated 15 September 1986 from UMBC to Ming Sing is read together with the assignment and, in our view, it can properly be so read, it being part of the surrounding circumstances, it is obvious that although the entire sub-contract sum was payable to UMBC, through the account opened by Aluminex with UMBC, yet, UMBC was to pay itself only 50% of the sub-contract sum (RM2.3m or the value of the glass) and then pay the surplus to Aluminex.

In these circumstances, it is difficult to see how it could be said that there was a manufacture of a new item or the mixing of goods wherein the new product was vested in Aluminex. We therefore fail to see how the case of *Clough Mill v Martin*[7] assists UAB.

Does the fact that UAB's debentures were prior in point of time and contained negative pledges against the creation of later prior-ranking charges operate to defeat UMBC's claim to priority?

It is true that UAB's debentures were prior in point of time and they contained restrictions on Aluminex's power to create later prior-ranking charges, save with the written consent of UAB, but clearly, that does not confer upon the debenture holders, UAB, and their receivers, a charge over anything more than Aluminex itself had over the additional asset, which was merely the right to acquire beneficial ownership to accompany the legal ownership of the glass, upon payment of the full purchase price therefor. To put it another way, you cannot pick out the benefit of an asset without also

accepting the encumberance on it. (See *Rother Iron Works Ltd v Canterbury Precision Engineers Ltd*,[8] *NW Robbie & Co Ltd v Witney Warehouse Co Ltd*[9] and *George Barker (Transport) Ltd v Eynon*.[10]) Our answer to this question, therefore, is 'No'.

Did notice of the existence of UAB's prior registered debentures constitute notice to UMBC of their contents, including the negative pledges?

It is also true, as counsel for UAB has stressed, that when UMBC took the assignment and registered it as a charge with the Registry of Companies, Kuala Lumpur, pursuant to s 108(3)(d) of the Act, it was aware of the existence of the prior registered debenture and supplemental debenture held by UAB, but a wealth of English authority indicates that, contrary to ordinary conveyancing practice, notice of a debenture creating a floating charge does not constitute notice of the terms thereof, including restrictive clauses forbidding the creation of later charges ranking in priority to or pari passu with the charge containing the clause. (See *English and Scottish Mercantile Investment Co v Brunton*;[11] *Re Castell & Brown Ltd*;[12] *Re Valletort Sanitary Steam Laundry Co Ltd*;[13] *Wilson v Kelland*[2] and *G & T Earle Ltd v Hemsworth RDC*.[14])

We are mindful of the fact that, when these cases were decided, restrictive clauses of the kind we have referred to were rarely encountered, whereas nowadays, they are regularly encountered. However, in Malaysia, the procedure in force, at the material time, for registration of a debenture, did not require a record to be made of the particulars of a restrictive clause of the sort we have referred to. (Compare the Singapore Company Regulations 1987, which makes provision for noting the restrictions or prohibitions on the company in connection with the charge.) Here, one was merely required to register certain particulars of a debenture or charge and one could do no more. More particularly, at the material time, the particulars required to be entered under the Malaysian Act (see Companies Regulations 1966 Sch 2, Form 34, prior to its amendment by PU(A)16 which came into force only on 1 February 1986) were these:

(a) the name of the company giving the charge;
(b) the date of the creation of the charge;
(c) description of the instrument creating or evidencing the charge;
(d) the amount secured by the charge;
(e) short description of the property affected; and
(f) names and addresses of the persons entitled to the charge.

We are, therefore, of the view that the English authorities cited above on this point should be followed and we accordingly do so.

We have also considered the question whether UMBC had actual notice of the restrictive clause in the debenture and the supplemental debenture on Aluminex's power to create later prior-ranking charges save with the written consent of UAB and are satisfied that, upon the evidence disclosed by the record provided, there is no such evidence. We need hardly add that the onus of proof as regards this point is upon UAB.

Conclusion

It follows that whilst it is true that the legal title in the glass passed to Aluminex upon delivery of the same pursuant to the contract of sale, Aluminex well knew and indeed, had consented to the glass and the progress payment certificates being subject to the equitable charge created in favour of UMBC, as evidenced by the assignment and the facility letter dated 15 October 1986. In other words, there was never any absolute sale of the glass to Aluminex, who thus took the glass subject to the rights of UMBC, and all that Aluminex acquired was an interest in the equity of redemption.

Therefore, the debenture holder, UAB, being in the position of an equitable assignee, cannot be in a better position than the assignor, Aluminex. In this, we are supported by the following passage in the judgment of Harvey CJ in *Matheson v Wahlen*[15] at p 194:

> It is quite true that the plaintiff's debenture is prior in time, and it expressly provides that no mortgage or charge is to be given by the company in priority to the charge thereby created; but it seems to me that that does not give the plaintiff a charge over anything more than the company itself at any time acquires, and if the company acquired property afterwards, not right out, but subject to a charge, and whether it was realty or personalty seems to me to make no difference, such charge seems to me must take priority over the plaintiff's debenture. The plaintiff cannot, by virtue of his charge, enlarge the property which comes into the company's hands.

We note that the case of *Matheson v Wahlen*[15] was followed in *Re Bunbury Foods Pty Ltd.*[16]

On a further ground also, the appellant is entitled to succeed.

If, contrary to our primary view, the assignment did not give rise to an equitable charge in the glass in favour of UMBC as unpaid seller, having regard to the principles enunciated in *Wilson v Kelland*,[2] *Re Connolly Brothers Ltd (No 2)*[3] and *Security Trust Company Ltd v Royal Bank of Canada*,[4] then, upon the evidence, we are satisfied that the assignment amounted to a subsequent fixed charge in respect of the book debts of Aluminex — that is, debts arising in the course of a trader's business which are of such a kind that it would ordinarily be entered in a trader's books or the modern equivalent of books, eg computer records, whether, in fact, so entered or not (see *Shipley v Marshall*;[17] *Independent Automatic Sales Ltd v Knowles & Foster*[18]) — which takes priority over the debentures of UAB, since the debentures had not crystallized at the date of the assignment and UMBC did not have express notice of the restrictive clauses in the debentures.

In the result, the appeal is allowed, the order of the learned judge in the court below on the issue of priority and his orders consequential thereto, are set aside and, in lieu thereof, we substitute, a declaration that the appellants, UMBC, are entitled to priority over the second respondents, UAB, that the sum of RM285,811.88 now held on fixed deposit with UMBC, together with all interest which has accrued and continues to accrue therefrom, be paid out to UMBC forthwith, in repayment of the loan granted by UMBC to Ming Sing.

A We need hardly add, since it goes without saying, that Aluminex are entitled to the balance sum of RM290,283.20 due on 31 July 1988 under the sub-contract dated 18 April 1986, and this, together with all other sums as may have become due under the sub-contract (save and except the sum of RM285,811.88 aforesaid and interest which has accrued and continues to accrue therefrom), must be paid by the main contractors, Takenaka and B Pembinaan Maluri (the second and the third defendants), to the sub-contractor, Aluminex.

Finally, UMBC must also have the costs of the proceedings both here and in the court below and, there must be an order for the refund to UMBC of the sum paid by way of deposit for security for costs of the appeal.

C *Appeal allowed.*

Reported by Prof Ahmad Ibrahim

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